

BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE ADOPTION OF)
REGULATIONS CONCERNING THE IMPLEMENTA-))
TION OF 74 *DELAWARE LAWS, CHAPTER 317*)
(2004) GRANTING THE DELAWARE PUBLIC)
SERVICE COMMISSION THE JURISDICTION) PSC REGULATIONS DOCKET NO. 54
TO REGULATE WASTEWATER UTILITIES,)
INCLUDING THE JURISDICTION TO GRANT)
AND REVOKE CERTIFICATES OF PUBLIC)
CONVENIENCE AND NECESSITY FOR WASTE-))
WATER UTILITES)
(OPENED OCTOBER 5, 2004))

ORDER NO. 6486

AND NOW, this 5th day of October, 2004;

WHEREAS, on July 6, 2004, new legislation was enacted by the Delaware General Assembly, found at 74 Delaware Laws, Chapter 317, which granted the Delaware Public Service Commission (the "Commission") jurisdiction to regulate Wastewater Utilities having more than fifty customers (hereinafter collectively "Wastewater Utilities"), including the jurisdiction to grant and revoke Certificates of Public Convenience and Necessity ("CPCN"); and

WHEAREAS, under 74 Delaware Laws, Chapter 317, any person or entity in the business of a Wastewater Utility as of June 7, 2004, and subject to the supervision and regulation of the Commission under the new legislation, is required to file with the Commission a schedule of its rates in effect as of June 7, 2004 within 120 days of enactment of the new legislation in such form as the Commission may require; and

WHEREAS, under the new legislation the rates of Wastewater Utilities are deemed in effect on a temporary basis and applications

for initial rate changes must be filed with the Commission within 180 days of enactment of the legislation; and

WHEREAS, in preparation for the implementation of this new jurisdiction over Wastewater Utilities, the Commission deems it appropriate, advisable, and in the public interest to promulgate regulations intended to govern certain practices and procedures before the Commission relating to such Wastewater Utilities; and

WHEREAS, the Commission has considered proposed regulations governing Wastewater Utilities prepared by the Commission's Staff; now, therefore,

IT IS SO ORDERED:

1. Pursuant to 26 Del. C. § 209 (a), and 29 Del. C. §§ 10111 *et seq.*, the Commission promulgates proposed Regulations Governing Wastewater Utilities Subject to the Jurisdiction of the Public Service Commission ("Regulations").

2. The Secretary of the Commission shall transmit to the Registrar of Regulations for publication in the Delaware Register the notice and the proposed Regulations attached hereto as Exhibits "A" and "B" respectively.

3. The Secretary of the Commission shall cause the notice attached hereto as Exhibit "A" to be published in *The News Journal* and *Delaware State News* newspapers on or before Tuesday, October 12, 2004.

4. The Secretary of the Commission shall cause the notice attached hereto as Exhibit "A" to be sent by U.S. mail to all Wastewater Utilities currently operating under a CPCN in Delaware and

all persons who have made timely written requests for advance notice of the Commission's regulation-making proceedings.

5. William F. O'Brien is designated the Hearing Examiner for this matter pursuant to *26 Del. C. § 502* and *29 Del. C. ch. 101*, and is authorized to organize, classify, and summarize all materials, evidence, and testimony filed in this docket, to conduct the public hearing contemplated under the attached notice, and to make proposed findings and recommendations to the Commission concerning Staff's proposed regulations on the basis of the materials, evidence, and testimony submitted. Hearing Examiner O'Brien is specifically authorized, in his discretion, to solicit additional comment and to conduct, on due notice, such public hearing(s) as may be required to develop further materials and evidence concerning any later submitted proposed regulations or amendments thereto. Francis J. Murphy, Esquire, is designated Staff Counsel for this matter. The public utilities regulated by the Commission are notified that they may be charged for the cost of this proceeding under *26 Del. C. § 114*.

6. The Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

/s/ Arnetta McRae
Chair

Vice Chair

PSC Regulation Docket No. 54, Order No. 6486 Cont'd.

/s/ Joann T. Conaway
Commissioner

/s/ Donald J. Puglisi
Commissioner

/s/ Jaymes B. Lester
Commissioner

ATTEST:

/s/ Karen J. Nickerson
Secretary

E X H I B I T "A"

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P U B L I C N O T I C E

The Delaware General Assembly has enacted legislation which granted the Delaware Public Service Commission (the "Commission") jurisdiction over wastewater utilities serving fifty or more customers in the aggregate. The legislation also made applications by such wastewater utilities for a Certificate of Public Convenience and Necessity ("CPCN") subject to the jurisdiction of the Commission. The new law is found at 74 *Delaware Laws, Chapter 317*. In the past, wastewater utilities filed applications for CPCNs with the Department of Natural Resources and Environmental Control ("DNREC"). The new legislation became effective on July 6, 2004.

In connection with the exercise of jurisdiction over wastewater utilities, the Commission is promulgating proposed new regulations to govern wastewater utilities. The first regulation contains definitions of terms used in the regulations. The second addresses the scope of the regulations themselves, which are intended to govern certain practices and procedures before the Commission relating to wastewater utilities.

Two regulations set forth requirements for an application for a CPCN, including requirements for a new wastewater utility that has never before been awarded a CPCN. A related regulation addresses the review, by the Commission's Staff, of a new CPCN application for compliance with statutes, applicable Rules of the Commission, and the regulations. A second related regulation requires the Commission Staff to cooperate with DNREC, the Department of Public Health, and other interested state, local and federal authorities, when an application for a CPCN is under review.

Two of the regulations address the notice to be given landowners in the proposed service territory covered by a wastewater utility's CPCN application, and the time limits within which affected landowners must object to the CPCN, and/or request a public hearing. One of the regulations governing notice contains a proposed statement to the landowners that would have to be included in the notice sent by a wastewater utility applying for a CPCN.

One of the new regulations is designed to govern proceedings to suspend or revoke a CPCN, and identifies the factors that must be present for the Commission to make a finding of good cause to suspend or revoke a CPCN. The same regulation confirms that such proceedings before the Commission must be conducted in accordance with applicable provisions of the Delaware Administrative Procedures Act, *29 Del. C. Ch. 101, Subchapter III*.

The final regulation relates to municipalities, government agencies, and wastewater authorities and districts that engage in or desire to engage in the business of a wastewater utility.

The Commission has authority to promulgate the regulations pursuant to 26 Del. C. § 209 (a), 29 Del. C. § 10111 et seq., and 74 Delaware Laws, Ch. 317.

The Commission hereby solicits written comments, suggestions, and compilations of data, briefs, or other written materials concerning the proposed regulations. Ten (10) copies of such materials shall be filed with the Commission at its office located at 861 Silver Lake Boulevard, Cannon Building, Suite 100, Dover, Delaware, 19904. **All such materials shall be filed with the Commission on or before November 30, 2004.** Persons who wish to participate in the proceedings but who do not wish to file written materials are asked to send a letter informing the Commission of their intention to participate on or before November 30, 2004.

In addition, the Commission will conduct at least one public hearing concerning the proposed regulations on December 8, 2004, beginning at 10:00 AM. The hearing will continue on December 9, 2004 at 10:00 AM, if necessary. The public hearing will be held at the Commission's Dover office, located at the address set forth in the preceding paragraph. Interested persons may present comments, evidence, testimony, and other materials at that public hearing.

The regulations and the materials submitted in connection therewith will be available for public inspection and copying at the Commission's Dover office during normal business hours. The fee for copying is \$0.25 per page. The regulations may also be reviewed, by appointment during normal business hours, at the office of the Division of the Public Advocate located at the Carvel State Office

Building, 4th Floor, 820 North French Street, Wilmington, Delaware 19801 and will also be available for review on the Commission's website: www.state.de.us/delpsc.

Any individual with disabilities who wishes to participate in these proceedings should contact the Commission to discuss any auxiliary aids or services needed to facilitate such review or participation. Such contact may be in person, by writing, by telephone, or otherwise. The Commission's toll-free telephone number (in Delaware) is (800) 282-8574. Any person with questions may also contact the Commission Staff at (302) 739-4247 or by Text Telephone at (302) 739-4333. Inquiries can also be sent by Internet e-mail to knickerson@state.de.us.

EXHIBIT “B”

REGULATIONS CONCERNING THE JURISDICTION OF THE PUBLIC SERVICE COMMISSION TO GRANT AND REVOKE CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY TO PROVIDE WASTEWATER SERVICES

1.0 Definitions

- 1.1 The following words and terms, when used in this regulation, should have the following meaning unless the context clearly indicates otherwise:

“Commission” means the Delaware Public Service Commission.

“CPCN” means a Certificate of Public Convenience and Necessity.

“DNREC” means the Delaware Department of Natural Resources and Environmental Control.

“DPA” means the Division of the Public Advocate.

“DPH” means the Division of Public Health of the Delaware Department of Health and Social Services

“Staff” means the Staff of the Delaware Public Service Commission.

“Secretary” means the Secretary of the Delaware Public Service Commission.

2.0 Scope and Authority

- 2.1 This regulation governs the process by which non-governmental wastewater utilities serving, or planning to serve, fifty or more customers (in the aggregate) apply for and are granted a CPCN to provide wastewater services. This regulation also contains procedures for municipalities, governmental agencies, and wastewater authorities and districts, to notify the Commission of its service territory and planned service extensions.
- 2.2 Authority for these regulations is granted by *26 Del. C. § 203D*.
- 2.3 Proceedings before the Commission for wastewater utilities shall be conducted in accordance with the procedures set forth in *29 Del. C. Ch. 101, Subchapter III*, including any proceedings where the Commission finds that an applicant is

unwilling or unable to provide safe, adequate, and reliable wastewater service to existing customers, or is currently subject to such a Commission finding under 26 *Del. C. § 203D(e)*.

3.0 Application for a Certificate of Public Convenience and Necessity

- 3.1 An application for a CPCN to begin the business of a wastewater utility, or to extend or expand the business or operations of an existing wastewater utility, shall be made in writing and filed with the Commission. The application shall include all information and supporting documentation required by statute, the Rules of Practice and Procedure of the Commission, and these regulations, and shall not be considered complete until all such information and supporting documentation has been filed with the Commission. At the time of filing, the application shall:
 - 3.1.1 Contain a statement explaining the reason(s) why the Commission should grant the CPCN, and include citations to all statutory and regulatory authority upon which the application is based, or upon which the applicant relies to support the application.
 - 3.1.2 A statement identifying any significant element of the application that, to the applicant's knowledge, represents a departure from prior decisions of the Commission.
 - 3.1.3 State the name, address, telephone number, and e-mail address (if any) of the individual to be notified if Staff determines there are deficiencies in the application.
 - 3.1.4 For applications submitted under 26 *Del. C. § 203D(d)(2)*, contain the supporting documentation required by 26 *Del. C. § 203D*, that all landowners of the proposed territory have been notified of the application by certified mail.
 - 3.1.5 A complete list of county tax map parcel number(s), and the corresponding names and mailing addresses of the property owners, for the area covered by the application.
 - 3.1.6 Copies of the tax map or maps with the proposed service territory clearly marked.
 - 3.1.7 A check made out to the Delaware Public Service Commission as specified in Title 26.
- 3.2 If an application for a CPCN involves a wastewater utility project or service that requires the review, approval or authorization of any other state, local or federal regulatory body, including DNREC, the application to the Commission shall so state, and include the following:

- 3.2.1 A statement of the current status of such application or applications.
- 3.2.2 If a determination has been made with respect to such application by the other regulatory body or bodies, the applicant shall include a copy of any permit, order, certificate, or other document issued by the regulatory body; and,
- 3.2.3 If a determination is made by the other regulatory body or bodies with respect to such application after the filing of the CPCN application with the Commission, but prior to its determination, a copy of any permit, order, certificate or other document issued by the regulatory body or bodies shall be filed with the Commission within six working days of receipt.
- 3.3 If not presently on file with the Commission, an applicant for a CPCN shall provide the following with the CPCN application:
 - 3.3.1 A corporate history including dates of incorporation, subsequent acquisitions and/or mergers;
 - 3.3.2 A complete description of all relationships between the applicant and its parent, subsidiaries, and affiliates, and a chart or charts that depict the inter-company relationships;
 - 3.3.3 A map or maps identifying all areas, including towns, cities, counties, or other government subdivisions to which service is currently provided;
 - 3.3.4 Annual reports to stockholders for the applicant, its subsidiaries, and its parent for the last two years;
 - 3.3.5 The applicant's audited financial statements, 10K's, and all proxy material for the last two years;
 - 3.3.6 Any report or document submitted by the applicant within the preceding twelve months to any state or federal authorities in any proceeding where an issue has been raised regarding the applicant's failure to comply with any statute, regulation, rule, or order related to the provision of safe, adequate and reliable wastewater services to its existing customers; and
 - 3.3.7 Evidence of comprehensive general liability insurance.
 - 3.3.8 Supporting documentation not filed with the application shall be made available upon request for Staff review

- 3.4 An applicant for a CPCN that proposes to extend services into the service territory of a municipality, government agency or wastewater authority or district must submit written documentation that such entity has been informed of and has approved such an expansion by the applicant.
- 3.5 During the course of the Staff investigation of an application, the Commission may require an applicant to furnish additional information specifically related to the statutory standards for Commission review and consideration and pertaining to the financial viability of the applicant.
- 3.6 An applicant for a CPCN shall submit one original and 10 copies of the application and shall include three copies of applicable maps.

4.0 Additional Requirements for a CPCN Application Filed by a New Wastewater Utility

- 4.1 Except for municipalities, governmental agencies and wastewater authorities and districts, and wastewater utilities serving or to serve fewer than 50 customers in the aggregate, any new wastewater utility that has not previously been awarded a CPCN in Delaware and that will begin operations or connect its 50th customer after June 7, 2004, must submit the following information with its CPCN application:
 - 4.1.1 Evidence that it possesses the financial, operational, and managerial capacity to comply with all federal, state and local wastewater requirements, by maintaining capacity sufficient to meet existing and reasonably anticipated future peak daily and monthly demands;
 - 4.1.2 A certified copy of the applicant's certificate of incorporation or business license if not presently on file with the Commission;
 - 4.1.3 Details of plant as to type, capacity, cost, status of plant construction, construction schedule, and estimated number of customers to be served; and
 - 4.1.4 A map showing the location and size, in acres or square feet, of the proposed territory, and the composition, diameter, length, and location of pipes to be initially installed.
- 4.2 Any existing wastewater utility that did not obtain a CPCN from the Commission by December 3, 2004 as required by *26 Del. C. § 203D(a)(2)*, must comply with the requirements set forth in Section 4.1 of these rules.

5.0 Review of Application; Deficiencies in the Application

- 5.1 The Staff shall review all CPCN applications for compliance with applicable statutes and these regulations. The Staff will, within twenty-one days after the date of filing, specifically identify any deficiencies in the application, and promptly notify the applicant of the alleged deficiencies.
- 5.2 The applicant shall have thirty days from the date of the receipt of the notice of the deficiencies in the application to file a corrected or supplemental application. The Commission may, in its discretion, extend the period to cure deficiencies in the application for an additional thirty days.
- 5.3 Only upon the applicant's filing of a corrected or supplemental application correcting the deficiencies shall such application be deemed completed and filed with the Commission for purposes of the time limits for action by the Commission under *26 Del. C. § 203D(g)(1)*. In the event the alleged deficiencies are not cured within the time provided hereunder, Staff may move the Commission to reject the utility's application for non-compliance with these regulations.
- 5.4 Nothing in this regulation shall prevent an applicant from filing an application in draft form for Staff's informal review and comment without prejudice. Such informal review and comment shall not be unreasonably withheld by Staff; nor shall this regulation affect or delay the filing date of applications that comply with applicable statutes and these regulations, or whose non-compliance is deemed minor or immaterial by the Commission or its Staff.

6.0 Filing of Application with DNREC and DPH; Coordination and Cooperation

- 6.1 An applicant for a CPCN shall file an identical copy of the application and its supporting documentation with DNREC and DPH within three days of filing the same with the Commission.
- 6.2 Staff shall send a written request to DNREC and DPH soliciting written comment as to whether it is aware of any matters indicating that the applicant has been unwilling or unable to provide safe, adequate and reliable wastewater services to existing customers.
- 6.3 Staff shall coordinate and cooperate with DNREC and DPH during the process of reviewing an application for a CPCN. Staff shall also coordinate and cooperate with the DPA and other interested state, local, and federal authorities.

7.0 Provision of Notice to all Landowners, Governing County and Adjacent Towns and/or Cities of the Proposed Territory

- 7.1 Pursuant to the provisions of *26 Del. C. § 203D(d)(2)*, prior to filing the application with the Commission, the applicant shall provide written notice of the anticipated filing of the application to all landowners of the proposed territory.
- 7.2 Such written notice shall be sent to all landowners of the proposed territory not more than sixty days and not less than thirty days prior to the filing of the application, and must include, at a minimum, the following statement:

“Pursuant to *26 Delaware Code, Section 203D(d)(2)*, an application for a Certificate of Public Convenience and Necessity (CPCN) will be submitted to the Delaware Public Service Commission on or about {enter date of intended submission}. Your property has been included within an area {enter name of your organization} intends to serve with public wastewater and we are required to inform you of certain information. The area to be served is {provide a shorthand description of the service area}. If you agree to the inclusion of your property in the proposed service area, no action on your part is required. Inclusion of your property in a CPCN area does not obligate you to connect immediately to our system; however, should your existing system fail and public wastewater services are deemed to be legally and publicly available, you may then be required to connect.”

“Under Delaware law, the Public Service Commission cannot grant a CPCN to {enter name of your organization} if a majority of the landowners in the proposed wastewater service area object to the issuance of the CPCN. If you object to the issuance of a CPCN for the proposed area that includes your property, you must notify the Commission, in writing, within sixty days of your receipt of this notice or within thirty days of the filing of the completed application for a CPCN, whichever is greater.”

“You may also request a public hearing on this matter. The purpose of the public hearing will be to demonstrate why it would not be in the public interest for the Commission to grant {enter name of your organization} a CPCN to provide wastewater services to the proposed area. A request for a public hearing must be made in writing to the Commission within sixty days of your receipt of this notice or within thirty days of the filing of the completed application for a CPCN, whichever is greater.”

“Written notice of your decision to object to the issuance of the CPCN or your written request for a public hearing, should be sent to the Secretary of the Delaware Public Service Commission at the address shown below. Any written notice sent to the Commission must include the description of the service area referred to above, your tax parcel identification number, and the name of the applicant so the Commission will be able to identify the CPCN application to which your notice is related.

Secretary
Delaware Public Service Commission
861 Silver Lake Boulevard
Cannon Building
Suite100
Dover, Delaware 19904

“Questions regarding objections or public hearings may be directed to: {enter the name or title, and the address and telephone number of the Commission's contact person(s)}.”

8.0 Landowners Who Object or Request a Public Hearing; Time Limits; Extension of Time

- 8.1 In proceedings involving an application submitted under *26 Del.C. §203D(d)(2)*, any landowner whose property, or any part thereof, is located within the proposed territory to be served may object to the issuance of the CPCN or request a public hearing. The applicant shall inform the Commission of the name and address of any landowner who notifies the applicant of their objection to the issuance of the CPCN or who requests a public hearing. Any written notice received from a landowner shall be filed with the Commission.
- 8.2 The Commission shall maintain records identifying any landowner who has provided written notice of their objection to the issuance of the CPCN or who has requested a public hearing. Such records shall be made available to the applicant.
- 8.3 Written notice from a landowner either objecting to the issuance of the CPCN or requesting a public hearing must be filed with the Commission within sixty days from the date of the landowner's receipt of a written notice from the wastewater utility that complies with Section 7.0 of these rules, or within thirty days of the filing of the completed application, whichever period is greater.
- 8.4 The Commission may, in the exercise of its discretion, extend the time to object or to request a public hearing even though the period in which to do so has expired.

9.0 Suspension or Revocation of CPCN for Good Cause

- 9.1 Pursuant to the provisions of 26 Del. C. § 203D(j), the Commission may suspend or revoke a CPCN, or a portion thereof, for good cause. Good cause shall consist of:
- 9.1.1 A finding made by the Commission of material noncompliance by the holder of the certificate with any provisions of Titles 7, 16 or 26 dealing with the provision of wastewater services to customers, or any order or rule of the Commission relating to the same; or,
 - 9.1.2 A finding by the Commission that the wastewater utility has failed in a material manner to provide adequate or safe wastewater service to customers as evidenced by inadequate customer service, insufficient investment in, or inadequate operation of, the system or otherwise; and,
 - 9.1.3 A finding by the Commission that, to the extent practicable, service to customers will remain uninterrupted under an alternative wastewater utility or a designated third party capable of providing adequate wastewater service; and,
 - 9.1.4. A finding by the Commission that to the extent practicable, any financial consequences to customers served by the utility subject to a revocation are appropriately mitigated. (*74 Del. Laws, ch. 317, § 6.*)
- 9.2 In addition to the factors described in Section 9.1 above, the Commission may consider one or more of the following factors in determining whether to suspend or revoke a CPCN:
- 9.2.1 Fraud, dishonesty, misrepresentation, self-dealing, managerial dereliction, or gross mismanagement on the part of the wastewater utility; or
 - 9.2.2 Criminal conduct on the part of the wastewater utility; or
 - 9.2.3 Actual, threatened or impending insolvency of the wastewater utility; or
 - 9.2.4 Persistent, serious, substantial violations of statutes or regulations governing the wastewater utility in addition to any finding of non-compliance required by Section 9.1.1 above; or

- 9.2.5 Failure or inability on the part of the wastewater utility to comply with an order of any other federal, state or local regulatory body after the wastewater utility has been notified of its non-compliance and given an opportunity to achieve compliance; or
 - 9.2.6 Such other factors as the Commission deems relevant to the determination to suspend or revoke a CPCN.
- 9.3 Proceedings before the Commission to suspend or revoke a CPCN for good cause shall be conducted in accordance with the procedures set forth in *29 Del. C. Ch. 101, Subchapter III*.
- 9.4 The Commission will not suspend or revoke a CPCN for good cause without first affording the wastewater utility a reasonable opportunity to correct the conditions that are alleged to constitute the grounds for the suspension or revocation of the CPCN, unless the Commission finds that the conduct of a wastewater utility poses an imminent threat to the health and safety of its customers, to the general public or to the environment.
- 10.0 Abandonment, Sale of Utility, and Transfer of CPCN
 - 10.1 A utility seeking to abandon service, sell, or transfer a CPCN shall file an application with the Commission and must receive Commission approval prior to such abandonment, sale, or transfer.
 - 10.2 Any entity acquiring a CPCN from the divesting utility must submit a CPCN application and receive Commission approval as specified in these regulations.
- 11.0 Municipalities, Governmental Agencies, and Wastewater Authorities and Districts
 - 11.1 As provided for in *26 Del. C. § 203D(b)*, municipalities, governmental agencies, and wastewater authorities and districts engaging in or desiring to engage in the business of a wastewater utility are not required to obtain a CPCN from the Commission for any existing or new service territory, or expansion of an existing territory.
 - 11.2 These entities shall provide to the Commission a description of any existing service territory for wastewater service no later than October 4, 2004, and shall promptly give notice and a description of any extension of wastewater territory or new wastewater service territory to the Commission.
 - 11.3 A municipality, governmental agency or wastewater authority or districts shall not extend service in areas where the Commission has granted a CPCN to another wastewater utility without receiving the approval of the Commission.